ROBERT G. LYNN

IBLA 82-912 Decided October 27, 1983

Appeal from decision of California State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer in part. CA 9929.

Set aside and remanded.

1. Oil and Gas Leases: Discretion to Lease

The Secretary has discretion to reject an offer to lease public lands for oil and gas exploration upon a determination supported by facts of record that leasing is not in the public interest because it is not consistent with the character of land classified as an outstanding natural area under 43 CFR Subpart 8352.

2. Oil and Gas Leases: Discretion to Lease

Where an offeror wishes to accept an oil and gas lease subject to a no surface occupancy stipulation, it is error to reject his offer to lease public lands where the record does not show consideration was given to whether issuance of such a lease was in the public interest.

APPEARANCES: John F. Shepherd, Esq., Washington, D.C., for appellant; Lawrence A. McHenry, Esq., Office of the Solicitor, Riverside, California, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Robert G. Lynn appeals from a decision of the California State Office, Bureau of Land Management (BLM), dated May 11, 1982, rejecting in part his noncompetitive oil and gas lease offer CA 9929. On May 15, 1981, appellant filed an application for 6,936.53 acres of land in T. 13 S., R. 17 E., San Bernardino meridian, California. On May 11, 1982, BLM rejected so much of appellant's lease offer as was located in the Algodones Dunes Outstanding Natural Area. The decision rejecting appellant's offer explains the partial rejection:

> A portion of the lands selected within this township are included in the Algodones Dunes Outstanding Natural Area. These lands have been set aside as an outstanding natural area to preserve and protect threatened and endangered plant and animal species in accordance with the Endangered Species Act of 1973. The lands included in this area are northeasterly of the Coachella Canal Right-of-Way, southwesterly of the Niland Glamis County Road and north of State Highway 78. The issuance of an oil and gas lease under the Act of February 25, 1920, is a matter completely within the discretion of the Secretary of the Interior. Haley v. Seaton, 281 F. 2d 620 (D.C. Cir. 1960). Under the circumstances described above, it appears the proper exercise of the discretionary authority is to reject that portion of offer CA 9929 within the Algodones Dunes Outstanding Natural Area. Accordingly, the offer is rejected as to the lands selected within the area described above.

Appellant represents that he holds an oil and gas lease adjacent to the rejected lands which would permit him to use directional drilling to explore and develop the rejected portion of his lease offer without surface entry onto the outstanding natural area. He seeks issuance of a lease with a "no surface occupancy" provision, and points to a prior environmental assessment report (EAR), dated September 1981, which considered the probable effect of geothermal leasing upon the dunes area as a support for his contention that such leasing, especially in his situation as described, is practicable. According to appellant, subsequent to the decision to reject part of appellant's offer within the Algodones Dunes, the area was designated a "wilderness study area" (WSA), pursuant to section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976). The record on appeal establishes that BLM has not considered appellant's desire to accept a no surface occupancy stipulation, nor has it considered the effect upon appellant's offer to lease of the WSA designation. BLM does appear to have considered the 1981 EAR, however, to reach the conclusion that oil and gas exploration would be inconsistent with the character of the area's use as an outstanding natural area.

[1] The discretionary authority of the Secretary to refuse to issue oil and gas leases is not disputed. See Udall v. Tallman, 380 U.S. 1 (1963). The stated aim of the BLM decision to reject appellant's offer is to preserve the character of the land in the dunes which has been classified pursuant to 43 CFR Subparts 2071 and 8352 as an outstanding natural area. The regulation directly applicable, 43 CFR 8352.0-2, provides: "(a) Outstanding natural areas. The objective is to manage for the maximum amount of recreation use possible on outstanding natural areas without damage to the natural features that make the areas outstanding."

In this situation, however, appellant argues that issuance to him of a lease will entail no use of the surface by his exploration effort whatsoever. It is his position that BLM has not considered the use of a no surface occupancy stipulation in this case, or has given the matter insufficient consideration, especially in light of the 1981 EAR which specifically found that exploration of the area for geothermal development could not be entirely excluded as a possible land use.

In a factually similar case, the Board observed in Ida Lee Anderson, 70 IBLA 259 (1983), that, where a lease of lands not withdrawn from the operation of the mineral leasing laws has been refused, the record of the BLM action should establish that BLM first considered whether the public interest could be protected by the use of reasonable stipulations to the lease. See also Mary A. Pettigrew, 64 IBLA 336 (1982). It is not apparent from the record on appeal that full consideration was given to alternatives to outright rejection of appellant's lease offer.

As was the case in Anderson, the EAR prepared for the Algodones Dunes area considers a number of possible alternative uses for the lands. In this case, BLM also prepared, for use with the EAR, a program decision option document which discusses three alternative actions: (1) unrestricted leasing, (2) leasing limited by stipulations restricting surface access and (3) no leasing. The EAR team recommended leasing subject to reasonable stipulations restricting use according to the nature of the land leased. This recommendation was not accepted by the options document, which combined options (2) and (3), and recommended the director close the lands affected by appellant's lease offer to leasing. This approach was adopted by the State Office. Appellant argues that the 1981 EAR, which contemplated only geothermal exploration, was not properly applied nor fully considered by BLM when it decided to reject appellant's oil and gas lease offer. Appellant also contends a no surface occupancy stipulation would adequately protect sensitive animal and plant life within the area. He argues also citing Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980), that rejection of his lease offer under the circumstances of this appeal is improper because there was not compliance with the provisions of section 204 of FLPMA, 43 U.S.C. § 1714 (1976), respecting withdrawal procedures. Finally, he contends leasing of the dunes is permitted despite the WSA designation of the land in controversy as an area "prospectively valuable" for oil and gas. If this be so, a no surface occupancy lease could be issued for the tract, according to appellant's argument, pursuant to BLM Instruction Memorandum No. 83-237 dated January 7, 1983, as changed January 19, 1983.

[2] Appellant correctly contends BLM should have considered the possibility of leasing the land included in the rejected portion of his offer under a no surface occupancy lease. As he points out in his Brief at pages 7 through 10, the 1981 geothermal EAR does not entirely support the BLM decision to reject appellant's lease offer, and is not entirely relevant to his offer, since it does not address the effects of oil and gas exploration. At best it can be said the EAR does observe at page 8 the similarity between the exploration methods used for oil and gas and geothermal operations. Since rejection of a lease offer is more severe than would be the most restrictive special stipulations made to protect the environment, the record here should show that BLM has first considered the use of stipulations to protect the public interest. Robert P. Kunkel, 41 IBLA 77 (1979). The record does not show that BLM considered appellant's expressed wish to accept a no surface occupancy lease, nor does it indicate how the findings of the 1981 geothermal EAR would be inconsistent with such a lease. Clearly, also, BLM has not considered the effect of designation as a WSA of the Algodones Dunes upon appellant's situation. Under the circumstances, the matter is

referred to BLM for further evaluation of appellant's offer in the light of this decision. See, e.g., Western Interstate Energy, Inc., 71 IBLA 19 (1983).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for further consideration consistent with this opinion.

Franklin D. Arness
Administrative Judge
Alternate Member

We concur:

Will A. Irwin
Administrative Judge

Anne Poindexter Lewis
Administrative Judge